BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

IN THE MATTER OF THE BOARD ORDER TO SHOW CAUSE RE: POTENTIAL PATTERN OF VIOLATIONS, INCLUDING NOTICES OF VIOLATION N91-35-1-1 AND N91-26-7-2 (#2), CO-OP MINING COMPANY, BEAR CANYON MINE, ACT/015/025, EMERY COUNTY, UTAH.	)	DOCKET NO. 92-041 CAUSE NO. ACT/015/025

FRIDAY, JANUARY 8, 1993, COMMENCING AT THE HOUR OF 10:00 AM, A HEARING WAS HELD IN THE ABOVE MATTER BEFORE TWO MEMBERS OF THE BOARD OF OIL, GAS AND MINING, 355 WEST NORTH TEMPLE, 3 TRIAD CENTER, SUITE 520, SALT LAKE CITY, UTAH 84180-1203.

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APPEARANCES

HEARING OFFICERS: JAMES W. CARTER
DAVE D. LAURISKI

STAFF MEMBERS:
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LYNDA S. JENSON, Secretary
THOMAS A. MITCHELL, Assistant Attorney General

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Salt Lake City, Utah, January 8, 1993 10:00 a.m.

MR. CARTER: This is the continuation of the hearing in the matter of the Board Order to Show Cause Re: Potential Pattern of Violations, Including N 91-35-1-1 and N 91-26-7-1, Part 2, Co-op Mining Company, Bear Canyon Mine ACT/015/025, Emery County, Utah. Docket No. 92-041, Cause No. ACT/015/025.

Just so we have something on the record, I requested at the Board's December hearing that counsel for the parties brief the issue of whether or not we could revisit the issues surrounding the penalty points that were assessed in the notices of violation, for the purposes of determining whether or not those notices constitute a pattern of violations. Subsequent to that hearing, Mr. Appel moved to intervene on behalf of the Castle Valley Special Service District, and under the administrative Procedures Act Board rules, we have liberal intervention rules, so I signed an order allowing the intervention, and I believe that order has been entered, hadn't it Jan?

MS. BROWN: Yes, Mr. Chairman.

MR. CARTER: All right. So, the Castle Special Service District is also properly a party.

At the outset, let me apologize; this is turning out to be a pretty narrow issue, and I got everybody dressed

up and driving through the snow to come here and argue what is boiling down to a fairly narrow issue. And what I'm anticipating doing is letting each of you argue the points in your memorandum, but I think -- let me just try this out and I'd like you to respond to this. My sense is that what this is boiling down to is -- let me back up.

It seems to me that Mr. Kingston is not suggesting that we redo the assessments or the penalties under the notices of violation, and that his proposal to offer evidence with regard to the willfulness or the knowingness of those violations is not for the purposes under mining or collaterally attacking those assessments.

The question, it seems to me, boils down to whether or not the penalty points which were in excess of 16, levied on those NOV's constitute willful and unwarranted, I think is the language in the rules, violations which would then precipitate a pattern of violations if you have more than one of those, two or more.

I understand Mr. Kingston's argument to be basically, that there is no real need for a hearing if 16 or more points is automatically willful or unwarranted. And there's -- once an entity got two

NOV's, that is, had more than 16 points, that would automatically be a pattern of violation.

So his suggestion is, since the rules provide there will be a separate, not necessarily separate, but a determination of willful and unwarranted activity, or violations, that something more must be required.

And I understand the State's position to be that having made the determinations -- oh, here's Mr. Lauriski, just in time.

That the Division Director did and the Board should deem those penalty points to constitute unwillful and unwarranted violations for the purposes of the pattern of violations proceedings.

So, there's a -- I think I misstated the question whether we were trying to figure out what we needed to know next, which was whether or not you could, whether or not Co-op could collaterally attack the Division's decision, and I think it's clear they cannot. But the question is, are those decisions then res judicata, even though the terminology is somewhat different. And maybe you could -- I'll let Mr. Mitchell respond to that, but focus your argument on that area.

MR. MITCHELL: I guess I would rephrase the Division's position slightly in terms of what I hope the brief sets out. I think there's two lines of authority

here that are of importance. One is the general concept of res judicata and collateral estoppel in an administrative posture, and the other is the unique aspects of the coal statute.

By statute, a finalized NOV and assessment is not a Division order, it is a Board order. So, we're not talking about the Board finding the Division's findings to be res judicata, but rather the Board recognizing its own final decision.

In other words, the statute says in two places, at 40-10-23 3 A, 40-10-22, "The Board shall assess civil penalties only after the person charged with violation has been given an opportunity for a public hearing." And then "failure to request the Board to hold a public hearing results in a situation" under 20 (2): "If the person charged with the violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Board after the Board has determined that a violation did occur and the amount of the penalty which is warranted, and has issued an order requiring the penalty be paid".

And that of course is why the Board under our present statute, that will be modified in this legislature, to change the mechanism somewhat, points to assessment conference officer who is the Board's

representative, and so that it's a final action by the Board. So the purposes of applying collateral estoppel here are, I think, as strong as they get.

Secondly, the statute provides that if you don't appeal it to the Board and escrow the funds, you essentially have waived any legal remedy with regard to the underlying facts, and to the proposed penalty amount.

I've cited you to the 30 CFR because our rules, as you know, the coal industry and the Division, worked to develop a set of rules for the State of Utah, are somewhat different, although by finding of the Office of Surface Mining no less effective, no less stringent. By finding of this Board, no more stringent, have determined that under 30 CFR of "unwarranted failure to comply" is defined as "failure of a permittee to prevent the occurrence of a violation of his or her permit or any requirement of the Act due to indifference, lack of diligence or lack of reasonable care," and "willful violation" to mean "an act or omission which violates the Act, this chapter, the applicable program, or any permit condition required by the Act, this chapter or the applicable program, committed by a person who intends the result which actually occurs".

Under the rules adopted by this Board, a finalized

assessment of 16 points or greater cannot be entered by and finalized as an action of this Board unless that violation occurs through a greater of fault, meaning reckless knowing or intentional conduct, should be conduct, will be assigned 16 to 30 points depending on the degree of fault.

So, I think the law is clear in this instance that you don't get an opportunity, when you had that original opportunity, and full due process in both Federal District and Federal Circuit Courts have found that there is complete due process opportunity. Even in the federal system, which is somewhat less due process than what we provide, because we allow the opportunity for that hearing on fact of violation short of, and essentially the Board's allowed through his representative to make that finding.

Finally, does this mean the Co-op is put in a position where this hearing is meaningless? I don't think that's the case. Two things. One, the Board must determine that they are -- there are two -- that they are the same or similar, and that they were the result of an inspection. One dropped out on an earlier review because it was not the result of an inspection, it was the result of failure to comply with the Division order. Certainly that's one of the safeguards this

Board provides in the order to show cause.

Secondly, if there was an administrative error and demonstration that through error in transcription or something, that could be rectified at this time.

But perhaps more importantly, the fact that there is a prima facie case of a pattern does not necessarily mean that the result of that pattern will be the same in all instances. There's a wide variation of possibilities. The Board can make a determination after hearing evidence from Mr. Kingston, that when you look at these, these are really isolated incidents. If you put them in the context of everything, that while there may be a technical pattern, it's not a pattern which justifies a suspension or revocation.

He might also argue that the purposes of the suspension or revocation under the Act are to in furtherance of remediation, and that the record since that time of Co-op does not require that action to be taken because they have taken the steps necessary to keep that from happening; and they now have a track record which shows that to do that would be unfair, unjust, unreasonable, and serve no purpose.

MR. CARTER: Let me ask you a question then. So, in terms of the equitable considerations that the Board would make at the time it was determining the penalty --

let me back up one step -- I keep doing this.

If the only issues that are contestable before the Board are, whether or not there were two, whether or not they were same and similar and resulted from an inspection, and in addition the Board is looking at whether there have been administrative or procedural errors below, how would Co-op convince the Board that they should be, even if that establishes the pattern, how then would they suggest to the Board that the Board should not levy some sort of severe penalty? Are you saying that --

MR. MITCHELL: I would say that, put in front of the Board, their history of violations show that these two which caused the pattern are isolated departures from, that the violations from the whole are small and diminimus. When you look at the degree of environmental harm, even if the pattern -- they might argue that the degree of environmental harm was slight. That their history of violations since that date demonstrate that this type of behavior that constitutes the pattern no longer exists in that mine and they have taken steps to safeguard that. There is a whole range of information relevant to what the Board ought to do in terms of dealing with this pattern that I think are relevant and admissible without being a collateral attack upon the

formalized determinations of: Did a violation occur, what did the Board find, and what did the Board assess when the Board makes a determination of 16 more points.

MR. CARTER: So you would still argue that Co-op shouldn't be entitled to introduce any evidence or testimony with regard to the fact or circumstances of the two violations that are the subject of the pattern proceedings?

MR. MITCHELL: I think they could with regard, perhaps, to the degree of environmental, but I don't think they could with regard to the culpability when they were finalized, in which they had more than adequate due process in challenging, and by statute they have waived the right in this or any other proceeding to collaterally attack.

MR. CARTER: So let me summarize, and Mr. Kingston, I'll let you go next and Mr. Appel. So you're -- in summary, what you are saying, that for the Board to take testimony with regard to the circumstances surrounding the violations, these two violations, would be to collaterally attack the Board's own order. That is, the Board would be allowing an attack on an order that it previously entered. Okay. I think I understand the argument.

Mr. Kingston?

MR. KINGSTON: Before I get into my argument, to respond to the comments of Mr. Mitchell; first, he says maybe we can argue about environmental harm in these other areas. Those are also areas which penalty points are assessed to determine the amount of penalty they come up with. There's no distinction on degree of negligence, environmental harm, history and these other factors. These are already considered in that penalty proceeding, where there's a table that's used and you assign so many points for negligence, so many points for environmental harm and so many points to history and so on. You come up with a total number, and you convert that to a dollar amount.

MR. CARTER: But the negligence points are separately stated?

MR. KINGSTON: They are all in that same factoring situation or computation that comes up with a dollar amount. If they can't use negligence, by the same reasoning we can't use environmental harm or history or anything else.

MR. MITCHELL: My argument is not that it can change the seriousness or degree of environmental harm, but if those work in his favor he can argue that they mitigate since that --

MR. CARTER: If this were a criminal proceeding,

we'd be talking about the guilty or not guilty stage in a sentencing phase, so your argument is that -- I'll take the State's argument to be there is not a means at this point for Co-op to contest that they have committed a pattern of violations; the only thing for them to argue about now is what the penalty would be.

MR. MITCHELL: The closest analogy is a driver's license revocation. The state issues somebody a license to drive. They get points when they incur violations; if at the time the violation occurred they take no action, pay up the fine, the points become part of the record, and if by statute a certain number of points results in a certain action, it may result in the loss of a license for a period of time. You do not, at the time of the hearing on the driver's license revocation, get to come in and contest the speeding ticket, the passing illegally ticket, the moving violations; you don't get to come in and say, well Judge, you know, back then on the speeding ticket where they said 40 over, it really wasn't 40 over and I've brought my brother in here to tell you that really I was only five over. And if it was only five over, the number of points would have been X, and therefore we don't have the number of points for driver's license revocation.

MR. CARTER: The language is different in the

driver's license situation. It's very clear that to everyone involved, that you accumulate too many points, you're in danger of losing your license. I understand Co-op's argument to be yes, we got points, but we didn't, because these points related to other language, let's seek a higher degree of fault, and we would only be in danger of losing our permit to mine if we committed willful or unwarranted kinds of activities. There was not a clear nexus for it, so we didn't see where this was heading.

I'm just -- I'm not saying that I'm agreeing with that argument, but I see the distinction; I think I understand your argument.

MR. MITCHELL: Well, a Judge I think, in a driver's license revocation, does not have -- once he determines the record is administratively complete, does not have discretion to not revoke the license. I think this Board, taking all relevant facts that are admissible, has discretion what remedy to fashion, and I'm saying there are numerous facts which are relevant. The only facts which I've put in front of you are those which I believe are facts which cannot be attacked, but which present a prima facie case. That fact does not bind this court in the face of other evidence from taking appropriate action.

MR. CARTER: Okay. Mr. Kingston, do you have anything?

MR. KINGSTON: Just briefly to respond to that, your Honor, I don't think we can liken this to a driver's license revocation or any other administrative or judicial proceeding. We've got to look at the statutes and the regulations and the languages that are in those statutes and regulations, and that's going to be the gist of my argument, that the regulations themselves and the statutes upon which the regulations are based, simply require the Board to make that determination. It's not res judicata and can't be used collaterally to stop us from presenting that evidence.

MR. CARTER: I don't know who to ask to go first with prepared argument, but if you'd like to begin, why don't you.

MR. KINGSTON: That's fine.

MR. CARTER: I'll offer you an opportunity to rebut.

MR. MITCHELL: I think I've essentially made my argument, so I'll be glad to.

MR. KINGSTON: Okay. Well then, I think Mr. Chairman, you hit it pretty well on the head. The issue is very narrow, and that issue is, what evidence must the Board consider to determine whether or not a pattern

of violations exist, and then the appropriate penalty if that determination is made.

As Mr. Mitchell indicated, the Utah statute is somewhat fashioned after the federal statute. Federal statute was, I believe, passed in 1977, so it's been in existence about 15 years, a little over 15 years. Since that date, Utah and other states have also properly updated statutes and regulations pretty much fashioned after the federal regulations, so they can -- could have supremacy and govern the activities of a mining operation within their own district.

Now, in researching and trying to find some precedent to this particular issue, I was unable to find anything that was real close other than the Texas case that I have cited in my memorandum, and of course the Texas case says that the underlying findings and conclusions are not the same as the final order. A final order may be as res judicata and can be used as collateral estoppel, but the underlying conclusions cannot be.

But really what this pointed out to me, when I could find no case on the pattern of violations, it should indicate to everyone, I think, that in order for a government entity to close down a business operation even for 48 hours, put 50 people out of work, the

negligence, or at least the fault, ought to be actually egregious. I can't find where it's been done in 15 years. And so I think the Board ought to consider that.

The other thing, we've got to look at the regulations. This administrative body is governed by its regulations, the power, the authorities. The obligations are set out by the language in the specific regulations and the statutes.

The statute regulates there are two separate proceedings, one to be -- one to determine the amount of penalty on an NOV, and a separate proceeding to determine whether there's a pattern of violations. And the proceedings and the regulations and the governing authority is quite different in each one of those separate types of proceedings.

In the penalty proceeding, an inspector visits the mine site. If he observes something that he perceives to be a violation of the regulations he issues what is called an NOV, Notice of Violation. He submits a report to the Division on his findings, and assessment officers at the Division level, based upon the evidence that he has, he considers history, he considers degree of fault, he considers damage that's occurred, and there's a penalty schedule that he uses to determine how much penalty points to assess for all these different areas.

Only one of those being degree of fault. He totals up the penalty points and converts that by a table to the amount of dollars that is going to be assessed against that mine.

This proposed assessment is sent to the mine with instructions that it must pay it or has a 30-day right to contest that finding and the proposed penalty.

If the mine wishes to pay that penalty, of course it's over with and sends in a check. If it does not agree with the proposed assessment, it requests an informal assessment conference. As I understand it -- I haven't attended these -- but as I understand it, at that informal assessment conference, there are two separate issues determined. Number one, the fact of violation, and number two, whether or not those penalty points are appropriate, and the dollar amounts appropriate. And I believe there are two separate assessment officers, each one deciding one issue there.

I've been told that primarily the person that determined whether or not the violation occurred is generally Dr. Nielson. And I'm told -- at least in Co-op's case -- that person that determines whether the penalty points are appropriate is Mr. Mitchell. So, assuming the operator wants to contest that NOV and the points assessed, it requests the hearing and attends a

hearing, presents evidence on all of these issues, past history, and the Division presents issues. I presume the inspector is there and other people from the Division can also be present.

After the evidence is heard, and I don't know whether there's a separate hearing -- I presume it's the same hearing with both these officers present -- then the determination is made whether or not to change that or to keep it the same way it is. And now notice is sent to the operator saying, this is our determination after the assessment conference, and you can also appeal that through the Board.

Then, it gets sticky. If they decide to appeal that decision to the Board they have to hire an attorney. The operator can't do that on his own; a licensed attorney or someone licensed to practice in Utah. They have got to pay the penalty in to escrow before they can have the matter heard. They have got to appear before the Board, bring up all the witnesses, spend at least one day, and as I am sure you can recognize, that sometimes can go into more than one day, with the witnesses traveling from Huntington and Salt Lake City and back again. To save a few hundred dollars that they might be able to save by going this procedure, it simply is not economically feasible in a number of cases to do

that.

Anyway, at some point that assessment becomes final and the final order, that has to be paid. Then, there's a separate procedure for determining pattern of violations. The Division director periodically reviews the assessment history of all of the mines in the district, I presume. In fact, they did that with Co-op, and it is determined, based upon the number of violations issued over a two-year period of time, it appears there may be a pattern of violations. Their procedure is to notify the operator that there is a potential pattern of violations, and you have the right to come in and discuss this with me and show me evidence that it is not, or you're going to be in danger of being suspended or shut down.

That was done. Co-op requested the hearing before Dr. Nielson and other members of the Division.

At that hearing, evidence was invited and evidence was presented regarding negligence and all of these other factors.

At that hearing there were primarily the three violations that were considered. One on the maps, one on the road, the one on the alleged enlargement of the path. Contrary to Mr. Mitchell's assertion that one was kicked out because it wasn't on-site inspection, Dr.

Nielson made it clear in her findings, conclusion and order that one was kicked out because the degree of negligence necessary to support a pattern of violations was not shown by the evidence at that hearing, regardless of the number of penalty points assigned to that at the assessment conference.

On page 6, occurred "Findings, conclusions and order," paragraph five, this is the N91-20-1-1, I'm quoting, "was caused by Co-op's failure to meet a deadline for submissions of maps and information. Failure of the permittee to diligently complete an abatement is not justification for extension of the abatement time as delineated in Utah Administrative Rule 645-400-324. However there is reason to believe that the failure to timely abatement may have been caused by factors in addition to negligence or lack of diligence. In consideration of the work to be done, and Co-Op's efforts to complete that work, the nature of the response does not constitute a willful or unwarranted failure to comply."

The Division director very clearly understood and acknowledged that they could not rely upon the number of points assessed at the assessment conference to determine willfulness and unwarranted failure to comply. At that hearing, Mr. Mitchell was present, Dr.

Nielson advised us that she would make a determination based upon the evidence presented at that hearing as to whether or not a pattern existed. She also advised us with Mr. Mitchell present that if we disagreed with her determination, we could challenge her findings and conclusions regarding negligence and the other things.

And, of course, the last paragraph of her order states, "Co-op has the right to an appeal of this informal order."

That's what we're doing here, is appealing that informal order. For appealing her order, we certainly have the right to check into the facts and the conclusions that she arrived at in making that order, and that's what we're doing.

Dr. Nielson was correct, and the regulations and the rules are also very specific and, I think, lead us to that very same conclusion, that there has to be a separate determination of two factors. There has to be a pattern of violations, the same and similar type, and more than one inspection. That's one that the regulations very specifically says has to be found. It also has to be found at each one of these violations. You have to find a greater degree of negligence and Rule 645-400-331 makes it very specific that that is the Board that has to make that determination, not the

Division.

And we'll quote from that regulation, "If the Board determines that a pattern of violations of any requirement of the State program or any permit condition required by the Act exists or has existed, and that each violation was caused by the permittee willfully, or through an unwarranted failure to comply with those requirements or conditions."

The Board must find that, not the Division. Over under R 645-400-335.100, that is the specific regulation determining procedure to be followed at the Board hearing where a pattern of violations is contested. It says "At such hearing the Division will have the burden of establishing a prima facie case for suspension or revocation of the permit based upon clear and convincing evidence. The ultimate burden of persuasion, that a permit should not be suspended or revoked, will rest with the permittee."

Now, the Division contends that clear and convincing evidence is simply showing that a violation was issued and a number of penalty points were assessed. That does not meet the burden of clear and convincing evidence, particularly where a previous regulation says the Board must make that determination.

Now, this is greater than ordinary negligence. Now,

that is particularly important in this particular hearing for this reason: Of the three violations being considered by Dr. Nielson to determine whether or not a pattern existed, the one was kicked out because the negligence factor was not shown to exist.

The other two that she relied upon to find a pattern existed, the operator never presented any evidence to the Division or to the Board regarding negligence. There was the one on the pad and the one on the road. The one on the road, frankly, and I'll be candid with the Board members here present today, after the notice of assessment was sent out to the operator, they reviewed it, and determined that, based upon their past experience before the Division, they were not going to get that fact of violation kicked out. They constructed the road, didn't get prior Division approval to construct that road.

They felt that the penalty points were too high, but knew that by going to the informal assessment conference, the fact of violation would stand based upon their previous experience of Mr. Mitchell. They tell me he pays a great deal of deference to the other people in his office, he very, very seldom changes the point assessment, regardless of what information is presented.

So, they felt by going to the initial assessment conference, the violation would stand, and the penalty points would probably not be changed. So, then they had the right to appeal. To appeal this one violation they would have to hire an attorney, pay the penalty into court in an escrow account to get to the hearing stage and bring all the witnesses up from Huntington, Utah to Salt Lake City to spend at least a day here in Salt Lake City and go back again.

They felt that they could save some bucks by doing that, probably a couple hundred dollars, to get some points knocked down but spending a couple thousand dollars in doing that. It couldn't be justified economically.

On the other side, the enlarged pad enlargement, they made a determination when the initial, or the proposed assessment came down. In this case they strongly disagreed with both the fact of violation and points assessed. Testimony was invited and accepted before Dr. Nielson, that in fact Co-op did prepare a request for informal conference, assessment conference. They sent that letter to the Division, but the Division never received it. At least the Division's Board didn't show they received it. It wasn't in the file; no assessment conference was granted.

30 days expired, no date was set for hearing. After 30 days expires, you cannot request a conference; that became final. Co-Op had one alternative, to pay it. So neither in the road situation or in the pad situation was any evidence ever presented to the Division or, of course, to the Board regarding that negligence factor.

One other point is actually important in that proceeding. If Co-op had requested a hearing on either one of these violations and presented evidence of negligence, been dissatisfied and appealed that to the Board, none of that information on negligence either presented by Co-op or by the Division would have been appropriate to be brought before the Board. The regulations specifically state that those issues of negligence cannot be used as res judicata or collateral estoppel, or used for any purpose even in a hearing before the Board. And that's regulation.

MR. MITCHELL: I'll stipulate to that.

MR. KINGSTON: Well, I'd like to read it for the record, regardless of your stipulation. This is regulation 645-401-760. And this is the penalty proceeding. "At formal review proceedings before the Board, no evidence as to statements made or evidence produced by one party at an assessment conference will be introduced as evidence by another party or to impeach

a witness."

Now, if the regulations provide that in going from one step to another step in the penalty proposal you can't use that evidence when you get to the Board, it would be ridiculous to say you can't use it in the same procedure from one step to another, but you can go down and it all of a sudden becomes res judicata or collateral estoppel, it doesn't make sense. And when the legislature mandate and the regulations mandate that the Board, in this type of proceeding, has two functions, two things to look at, the violations, the pattern. Whether they constitute a pattern and the negligence factor, the Board is obligated, and I think the regulations if you read them as a whole makes it clear that the Board has got to consider anew the evidence of a negligence factor to determine whether that willfulness and unwarranted failure exists.

Just as a sidelight, and I think the Board also recognizes this, that if you get to that point, if you determine a pattern exists, and the negligence factor is there, then you still got to determine the appropriate penalty, and you cannot do that simply without looking at those factors. Again, we're not here trying to reduce those penalty points and knock down the monetary penalty. The final orders of the assessments, they are

final, and we are not challenging those here. We are not challenging the money that's been paid already. That's the final order.

But the underlying fact or conclusions the Division made and particularly just by assigning a certain number of points for negligence without any evidence ever being presented by the operator, that does not meet the burden the Board has or the Division has of producing clear and convincing evidence that this has occurred.

So I think that, based upon the only case that I can find in point, the cases cited by the Division of all -- you can't appeal a final order, we're not doing that. The decision in Texas, which was from the same type of body that you gentlemen are, was that you cannot use underlying findings of fact and underlying conclusions as res judicata in a subsequent proceeding. And I think the regulations here, where it says you can use them from the Division level to the Board level, if you can't, I think that should be clear to us that in this separate proceeding of the pattern of violations you can't use those penalty points to prove a negligence factor.

MR. CARTER: Okay. One observation. I think one of the reasons for the regulation that prohibits introducing evidence of what was discussed at the -- I

was going say settlement conference -- is because those conferences are intended, I think, to foster full disclosure, and a more free-wheeling decision in an attempt to resolve the circumstances and are analogous to settlement conferences, so you wouldn't want admissions that were made in the course of that to be thrown back in your face later if you decided to contest what happened there. But I appreciate your argument. I understand what you are saying. Mr. Mitchell?

MR. MITCHELL: We just --

MR. CARTER: We're leaving Mr. Appel out. We'll give you an opportunity.

MR. LAURISKI: I have a question. As I listen to you and you talked about the informal conference, going there with Dr. Nielson and other members of the staff, the question I have, are you trying to make a parallel here that says if I can take a penalty that has been paid and finalized before the Division director could determine whether or not you exhibit willful conduct toward a pattern of violation, that same procedure ought to be allowed to come before the Board?

MR. KINGSTON: I think that's a matter of judicial economy. I think if you are appealing a decision and that is precisely what we are doing here, we're not appealing the assessment conference, or the assessment

order, we were appealing Dr. Nielson's determination that a pattern of violation occurred and her order that it did. She considered evidence of negligence on each one of those factors and she concluded there was negligence in two, wasn't negligence in one.

If we were appealing her order directly, we have to be able to consider the things that she looked at to arrive at her decision to make the order, which was the negligence factor, sufficient to show willfulness and unwarrantable failure. She concluded it was; we're challenging that decision at this level.

MR. LAURISKI: You're saying it's immaterial whether or not you paid the penalty?

MR. KINGSTON: Yes, the penalty is final.

MR. CARTER: I understand your argument to be that because with regard to NOV, in 91-20-1-1, Dr. Nielson's order indicates on page 4, paragraph 10, that the final assessment for that NOV includes the assignment of 20 points for negligence which is more than 16.

But then she concludes later that in spite of 20 negligence points, that there was not willful or unwarranted failure to comply, so your suggestion is that that was a final determination with regard to negligence points. Yet in the proceeding before Dr. Nielson, a determination was made that that didn't

constitute unwarranted or willful.

MR. KINGSTON: Precisely. I think at that level where the Division Director is making a determination regarding whether the pattern exists or not, she can't consider penalty points, but that's not binding, certainly. She has to make her own determination regardless of the penalty points assessed by the assessment officers. That that degree of negligence required by the regulations to find a pattern of violations exist irrespective and regardless of the number of penalty points assessed. Yes, I think it's very clear from her order that's precisely what she did, and that's what we're challenging, not the assessment conference and the final NOV's.

MR. CARTER: Okay, I think I understand. Mr. Mitchell?

MR. MITCHELL: That has a lot of sex appeal. The problem with it is -- there are two problems. One, the director of the Division is perfectly capable of committing error, and what he's asking you to do is compound the error, and out of one side of his mouth he is saying on page seven of his brief, and also said it to you before, a finding by the Division is not binding on the Board. This occurred at an informal level and it's not binding.

Secondly, there can be no finding of a pattern except -- in other words, the Division's determination to put this in front of the Board and let the Board make the decision, it automatically results in an order to show cause; it does not require them to make a separate appeal. By operation of law, it requires an order to show cause. So, the fact that the Director of the Division erroneously made a finding in opposition to the Board's final determination, is of no consequence.

It's also true that the director of the Division on page 4 of those findings, made a finding that it was not the result of an inspection. And that drops it out. So it drops out, regardless of the fact that the Director of the Division erroneously, the first time she's been required to make this sort of review, made an error. But one, it's not binding on this Board; two, it's not admissible, and I've just stipulated with him that what went on at that informal level is not admissible.

And so, I recommend that that argument being struck because it's just the opposite.

MR. CARTER: We have in front of us "Findings, Conclusions and Order," signed by the Division Director.

MR. MITCHELL: But any discussion about what went on there, who said what, who presented what evidence, the

order, the Division's Director's document speaks for itself.

MR. CARTER: Correct.

MR. MITCHELL: And it's either correct or in error.

MR. KINGSTON: I have got to respond to that.

MR. CARTER: Okay. Mr. Kingston.

MR. KINGSTON: The section that says whether or not evidence at the informal hearing is admissible or not is very very narrowly construed and very specifically construed to regulate the informal assessment conference. It has nothing whatsoever to do with the evidence introduced at the hearing to determine whether or not a pattern of violations exist. That statute only applies or that regulation only applies to evidence at the informal assessment conference. And this is a different proceeding. That's what I'm saying, it can't even be used in the same proceeding, it certainly shouldn't be able to be used as res judicata in a separate proceeding where you are determining another issue.

MR. MITCHELL: One, it's a matter of administrative law that informal proceedings where there is no record of what goes on there except to the extent a final document comes out of it, is not admissible at a formal hearing. Two, the -- what the Board does in its final

determination of fact and violation and its final determination of how much negligence occurred, which is what we have here, we have a final Board order by statute, for this Board to find otherwise would be to make a finding that there has not been an NOV issued in the coal program legally in the entire history of the coal program. That's what the Board would have to find.

MR. CARTER: Mr. Lauriski?

MR. LAURISKI: Maybe I'm somewhat confused, but I'm going to try to put this in my perspective, a lay perspective. They were issued the NOV's, they paid the assessments on the NOV's and you're saying that becomes a final order.

MR. MITCHELL: Of this Board.

MR. LAURISKI: Okay. Subsequent to their paying that assessment, the Division then determined on a review of the NOV's that they had, over X period of time, that they had perhaps established a pattern of violations based upon the negligence findings of three of the violations that were issued in that period.

They so notified Co-op and gave Co-op an opportunity to come before the Board, or come before the Division to plead their case. Co-op does that and pleads their case with respect not necessarily to the fact of violation,

but to the negligence determinations that were made.

MR. MITCHELL: The Division essentially let them talk about whatever they wanted to talk about.

MR. LAURISKI: Okay. In the conclusion of that informal hearing, the Director determines that one of the three violations did not constitute unwarrantable failure and throws that out of the pattern of consideration.

MR. MITCHELL: The Director threw it out for two reasons. One, the Director made a determination that it was not unwarranted, I would argue incorrectly, and I also it was not a result of an inspection, a result of the Division order. So on the basis of those they threw it out.

MR. LAURISKI: Okay. Now, then she determines that, however, the other two violations do constitute unwarrantable failure and it's the rule --

MR. MITCHELL: She does not make a determination in the sense that it's -- she believes there's an adequate record there to go before the Board.

MR. LAURISKI: And she says -- the director says if you don't like our decision you can appeal this to the Board. This takes me back to my question. Co-op pays the assessment before the Division determines a pattern or determines there may be a pattern. Doesn't that stop

them from any further appeal if it's a final order of the Board at that point?

MR. MITCHELL: Well, I think --

MR. LAURISKI: You see where I'm driving here?

MR. MITCHELL: I think I'm hearing two confusing things. On the NOV where there's a finding of violation and assessment of points for them after they have several opportunities for hearing, and they are required to do certain things to get those hearings.

MR. LAURISKI: I think I understand that. Where I'm headed here -- let me just narrow this down. Had Co-op contested the violations and escrowed the money, saying we don't agree with the negligence findings, they may have agreed with the fact of violation but not the negligence findings based upon the penalty points you assessed. If we would have done that one simple thing we wouldn't have, or it wouldn't be an issue here today as to whether or not we could determine pattern of violation?

MR. MITCHELL: I'd say it's exactly the same. Whether they escrowed the money or didn't escrow the money, the effect -- if they came before the Board and had a formal hearing on the penalty points, it's clear that it's intuitive, intuitive to you that no they don't get to reargue those again to you. And I'm saying by

operation of law, the statute, the failure to escrow is the legal equivalent of having come before the Board and the Board having heard the evidence and said yep, those are the right number of points.

MR. CARTER: So your position is they would have had to appeal the negligence assessment successfully?

MR. MITCHELL: Right.

MR. CARTER: And gotten the point count down below 16?

MR. MITCHELL: Right.

MR. CARTER: At which point the Division Director's position would have been this is insufficient since -- or culpability to see a pattern.

MR. MITCHELL: Right. The failure to appeal to the Board is the same as appealing to the Board and losing. Because the net result is a final Board order, you know, holding those final points.

MR. CARTER: Mr. Kingston's argument would be whether they appealed and won or appealed and lost, the Board in his view needs to make a separate determination for the purpose of pattern of violation, not for the purposes of assessing.

MR. MITCHELL: But semantically, I think you have to kid yourself to think there's a difference there. Because the definition is of unwarranted, the real base

language, you cannot reach semantically a contrary conclusion.

MR. CARTER: Okay. This is helping me a lot.

MR. APPEL: May I wade in here somewhere? I'm busting at the seems. I won't take a great deal of time. I represent the several thousand water users whose sources are located next to this mine. And you can talk about procedural semantics and that these are rules and should they be applied, but you need a back drop that these people's water supplies are located here. Every notice of violation could critically impact the people who are using this water. We're very concerned and feel quite threatened by the existence of a pattern of violations.

I think that that is an extreme remedy. The fact it hadn't been utilized in the state of Utah indicates this to me.

It may be, and we've been arguing about semantics, it is an open and shut case and I would urge you that as part and parcel of the NOV finding which is, according to Mr. Mitchell, certified by the Board, becomes a Board decision. You have the point allocation process. You can't just pick one thing out of a final administrative determination and say well, you know, we just as soon take this one out because it's not final because we

don't want it to be, we don't think it's fair.

I'm troubled by the fact that Co-op says, when they are given a notice of violation it's not worth the several hundred bucks to make the trip. They're assessing their risks and making their own decisions. What they ought to be thinking is well, this is somewhat similar to the prior two or prior one, and realize that they are making their own decision concerning the existence of a pattern of violations. This concerns me greatly that they don't take this that seriously. They are the ones making the decisions. They are the ones who aren't appealing. They are ones paying the fine.

If you add all those things up, the way I read the statute, it probably is a pattern of violation, so the question becomes what can the Board consider? Well, there are a couple cases that I've read, and I'm not going to tell you they are on all fours, but in my brief the Wilford Neese versus OSM case, 433 ALJ, 2995, held that you cannot relitigate the facts set forth in the underlying notice of violation. I'd suggest to you that if they felt that the negligence point allocation or the allocation of negligence points was unfair, they should have relitigated it at that time or appealed it, part and parcel of that determination. And to go back and reopen it, is barred by the collateral estoppel and

administrative law.

In Gem Mining Company versus OSM 584 ALJ 4054, there was a holding that an unappealed notice of violation becomes final and may not be relitigated. You can't separate something that's final and appeal part of it or suggest that part of it can be relitigated. You have to do it during the appeal period or you render the entire appellate process meaningless. You can't go back and pick part of it you don't like and hope to sway the Board.

I would suggest also there are some options open to Co-op Mine. It may be there should be some exceptions to the NOV stage showing compelling legal or equity reasons such as violation of basic rights of the parties or the need to prevent injustice. It may be that they can say well, it was only 16 points or only 17 points, and that we're really a lot better than if this was 18, to support the first pattern of violations in the State of Utah. Those sorts of deliberations I believe are open to the Board, but to go back and try to reallocate something that was not appealed, to me is mistaken and is barred by collateral estoppel. Thank you.

MR. CARTER: So you're suggesting that this is somewhat different from the state's position, and that is that it is saying 16 points plus, by definition,

either unwarranted, willful or unwarranted failure to correct. And your suggestion would be that the Board could determine what level of negligence by way of points constitutes sufficient culpability to find a pattern of violation?

MR. APPEL: I'm suggesting what Mr. Mitchell said, more along those lines. The determination of 16 or more points was at issue below, then the methodology should have been attacked than to suggest they were not culpability standards. So if I left one of the impressions that I don't agree with that aspect of his presentation, that's not correct.

MR. CARTER: Okay. Mr. Kingston?

MR. KINGSTON: Yes.

MR. CARTER: Mr. Lauriski? All right.

MR. KINGSTON: In response to Mr. Appel. You can't pick out one factor in that penalty process, such as negligence, except in this case the regulations specifically say you've got to pick out that one factor because the Board has got to make a determination of negligence. Specifically the Board has got to make a determination of negligence. That one factor has to be picked out. The cases cited by Mr. Appel, I would agree with the holdings in those cases that says you can't challenge the findings and conclusions when you are

appealing or if the time for appeal is all ready over and challenging the final assessment of the final order in the penalty proceeding. We're not doing that, we're not challenging the final order. The violation will stand. We're challenging using underlying findings and conclusions that the case law and the regulations say you can't use in an entirely separate proceeding to determine something else and trying to impose another penalty.

MR. MITCHELL: I submit it's semantics, the final assessment is the final assessment. The Board made a finding, the Board cannot assign more than 16 points without making a final determination that the operator's culpability was reckless, knowing or intentional.

MR. APPEL: It's been found --

MR. MITCHELL: The Board made that finding under that violation.

MR. LAURISKI: Due to Co-op paying and agreeing to the assessment?

MR. APPEL: Failing to appeal, becomes a final administrative determination --

MR. MITCHELL: By the Board --

MR. CARTER: One at a time gentlemen. I think we clearly understand that. Is there anything further? Let me ask first, is there any further argument you want

to make? I think I have in my own mind a clear understanding of the points. Yours being a separate finding needs to be made and you should be entitled to offer evidence to prevent that from happening.

Yours being that a separate finding can't be made because it's already been made, and that to allow argument about, I'll say negligence, at this point would be, in effect, would be a collateral attack.

MR. APPEL: There is a separate issue there. If you are going to find that evidence may be put in on the issue of negligence, you're going to have to rule on the scope. Certainly you, in my view, you cannot readjudicate those original findings of negligence, and that's what I saw happening at the prior hearing.

MR. CARTER: I think what I experienced at the last hearing was Mr. Kingston introducing testimony leading to an argument that their actions were inadvertent at best, or perhaps misinterpreted and were actually that his argument would be Co-op was doing something other than the Division thought they were doing, and they were improperly cited. But then he goes on to say we paid the penalty because it wasn't worth challenging on that basis, but we should be allowed to demonstrate to the Board that what happened there was not so serious as to justify a finding a pattern of violation.

I'm not espousing either of the arguments, I'm trying to recount the arguments so that we're sure we have a clear understanding of what the arguments actually are.

MR. MITCHELL: I think it's so helpful, that recapitulation, that implicit in what Mr. Kingston wants to argue that in one instance they had a fellow operating a piece of equipment who didn't follow instructions on a road, and another instance they hired an engineer who failed to determine what he was going to do with the contents of the said pond and ended up enlarging. And that the operator was disadvantaged by that, and it was certainly unintentional on his part. But 323 in my brief, "In calculating points to be assigned for degree of fault the acts of all persons working on the coal exploration or coal reclamation project site will be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage."

And of course the time to establish that they were acts of sabotage is before it becomes finalized.

MR. CARTER: Okay, I think I understand. Mr. Lauriski, any questions?

MR. LAURISKI: No.

MR. CARTER: Anything further? I think we've got a

complete record. Just to let you know, I anticipate that Mr. Lauriski and I will take some time now to discuss this. I believe that this is a significant enough determination I would like the Board to hear our recommendations and discussion before they make a final determination. That matter has been scheduled for the January hearing?

MS. BROWN: Yes.

MR. KINGSTON: I've not received notice.

MR. CARTER: My suggestion would be that at the January hearing, the Board reach a determination as to how we're going to handle continuing this hearing, and that we not continue it in January, but postpone it until February. Again we don't have a problem on the ground right now that needs to be abated. This is a --

MR. MITCHELL: We have no problem with that from State's perspective.

MR. KINGSTON: No problem from our standpoint either obviously. At the January hearing, need I be present?

MR. CARTER: I don't think so. In fact the Board is going to be having a work session next Monday the 11th, and we may have an opportunity to discuss what happened with the rest of our Board members, plant the seeds, let them review the memoranda and then attempt to reach a decision by our January 27th hearing, so that we would

then know what the scope of the hearing would be in February, what we would be doing when we convened then.

MR. KINGSTON: So the plan now is you'd reach a determination at the January hearing; we need not be present. We probably will be present after being advised of your determination for the February hearing?

MR. CARTER: Exactly, that seems the way to proceed. All right. Thank you all very much. This was a lot more substantive than I thought. I thought it was pretty simple but it wasn't. This has been very well briefed, and it appears to be a case of first impression, certainly in Utah. So I think we want to discuss this with the entire Board and proceed carefully. Thank you all very much.

MR. KINGSTON: Thank you.

MR. MITCHELL: Thank you.

STATE OF UTAH)

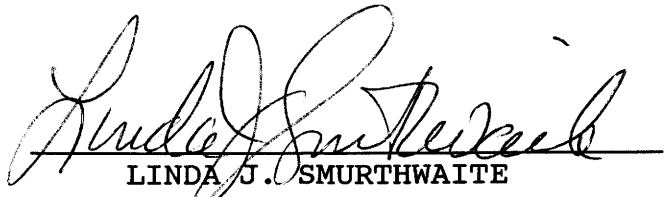
COUNTY OF SALT LAKE)

I, Linda J. Smurthwaite, Certified Shorthand Reporter, Registered Professional Reporter, and notary public within and for the county of Salt Lake, State of Utah do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision.

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In Witness Whereof, I have subscribed my name this 18th day of January, 1993.



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